United States Court of Appeals

for the Second Circuit

PETITIONER'S BRIEF

Sd. 250

76-4128

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To be argued by

STEPHEN B. HORTON

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

DOCKET NO. 76-4128

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HECTOR ADOLFO MONTOYA-ALVAREZ,
Petitioner

- against -

IMMIGRATION AND NATURALIZATION SERVICE,
Respondent

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Petition to Review an Order of the
Board of Immigration Appeals

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ATTORNEY FOR THE PETITIONER

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CASES CITED

ISSUE PRESENTED

WHETHER THE DECISION ORDERING THE DEPORTATION OF THE PETITIONER IS INVALID IN THAT SAID DEPORTATION WOULD EFFECT A DISCRIMINATION AGAINST THE CITIZEN INFANT CHILD OF THE PETITIONER

STATEMENT OF THE CASE

Pursuant to Section 106 of the Immigration and Nationality Act (the "Act"), 8 U.S.C. §1105a, Hector Adolfo Montoya-Alvarez petitions this Court for a review of a final order of deportation entered by the Board of Immigration Appeals (the "Board") on January 21, 1976. That order dismissed an appeal from the decision and order of an Immigration Judge finding him deportable under Section 241(a)(9) of the Act, 8 U.S.C. §1251(a)(9). The Petitioner contends that the Board's order should be reversed.

STATEMENT OF FACTS

The Petitioner is a 35 year old, married male alien, a native and citizen of Columbia. The Petitioner's wife, formerly a party to the proceedings below, is a 25 year old native and citizen of Columbia who returned to her country during the pendency of this action under an order of deportation. The Petitioner was admitted into the United States as a non-immigrant visitor for pleasure on or about February 2, 1969 and

was authorized to remain in that status until September 7, 1969. The Petitioner was employed during his authorized stay and on or about June 23, 1969 was granted a period of voluntary departure from the United States to be effected on or before July 14, 1960.

The Petitioner and his wife were married at Hartford, Connecticut on June 8, 1974. A child, Hector Adolfo was born to them at New York City on February 19, 1971.

On December 4, 1974, deportation proceedings were commenced with the issuance of an order to show cause and notice of hearing. During the deportation hearing held on January 6, 1975, the Petitioner admitted the essential factual allegations contained in the order to show cause (Nos. 1, 2, 3, 4, 7 and 8) but denied deportability. The Petitioner maintained, inter alia, that deporting the parents of a United States citizen child, is constructively equivalent to deporting the citizen himself. Further, the Petitioner requested and was granted a period of voluntary departure of 30 days.

On or about January 8, 1975, the Petitioner and his wife appealed to the Board, where oral argument was presented on January 10, 1976. Counsel represented to the Board that the Petitioner's wife and the citizen child had departed from the United States, and it was noted that her departure constituted a withdrawal of her appeal. The Board, in dismissing Petitioner's

appeal, stated it lacked the right to consder the Constitutionality of the statutes it administers.

ARGUMENT

It is, first, conceded that the Petitioner was in violation of his visa, and would be - - except for the effect upon the Constitutional rights of his citizen child - - deportable.

Several courts have determined that the citizen child of the petitioner is not the subject of Constitutionally prohibited discrimination as a result of the deportation of its parents. Perdido v. INS, 420 F2d. 1179 (2nd Cir. 1970), cert. den., 401 U.S. 921 (1971); Enciso-Cardoza v. INS, 504 F2d. 1252 (2nd Cir. 1974); Gonzalez-Cuevas v. INS, 515 F2d. 1222 (5th Cir. 1975).

However, as was stated in Acosta v. Gaffrey, (F2d), U.S.D.C. New Jersey, Civil Action No. 76-709 at page 4, "None of the reported decisions, however, considers what this Court views as the compelling issue presented in this case: May the United States constitutionally compel a citizen to submit to deportation, de facto or de jure?"

It is clear that by virtue of his birth in New York City, the Petitioner's son is a citizen of the United States. Perkins v. Elg, 307 U.S. 325 (1939). As such, the Constitutional incidents of that citizenship cannot be abridged by Congress.